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Supreme Court of the United States

OCTOBER TERM, 1954

No. 473

GULF OIL CORPORATION,

Appellant,

—against—

LAZARUS JOSEPH, as Comptroller of the City of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS APPEAL

MATTHEW S. GIBSON,
17 Battery Place,
New York 4, N. Y.,
Counsel for Appellant.

THE COURT PRESS, 130 Cedar Street, N. Y. C.

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The Judgment Below Should Be Treated as Final

The motion to dismiss seems on its face to be plausible. The motion correctly states the holdings in the decisions by this Court cited therein on the question of finality. In an ordinary run-of-the-mine appeal these decisions would be conclusive in cases involving the same states of facts.

This is not, however, the ordinary type of appeal lodged in this Court and the facts here are different. While the judgment of the New York Court of Appeals appears not to be final on its face, as pointed out in appellant's jurisdictional statement, it is in fact final, on the record herein: there can be no further appeal in this case to this Court.

Appellee Can Never Bring Any Federal Questions Before This Court

It is true, as stated by the appellee, that if this Court should affirm the decision of the Court of Appeals herein and a new "apportionment" formula later devised by the appellee is also disaffirmed by the Court of Appeals, federal questions may conceivably be involved in such disaffirmance. However, in that event the appellee cannot appeal to this Court because he cannot be heard to complain that the validity of these laws has been upheld; he still has this tax money; he is not an aggrieved party; and he can still devise a new formula. He can, in such case, petition this Court to review such decision on certiorari. The granting or denial of such a petition, however, obviously lies in the absolute discretion of this Court, and we submit that it would not be granted.

If this Court either dismisses this appeal or, after argument on the merits, affirms the judgment of the Court of Appeals and if that Court should subsequently invalidate as arbitrary a *second* "apportionment" formula of the appellee and should again remit the matter to the appellee for the purpose of his devising still a third formula, would this subsequent judgment remitting the case to the appellee, Comptroller, for his further action be a final judgment for the purposes of review by a writ of certiorari sought by him pursuant to 28 U. S. C. § 1257(3)? Obviously not. If, on the other hand, the Court of Appeals should approve such a second "apportionment" formula of the appellee, he could not be heard to complain in this tribunal. Therefore, appellee can never get a review herein by way of certiorari or appeal, and he can never bring any federal questions before this Court despite his suggestion to the contrary (appellee's motion, p. 4, first full paragraph).

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Appellee Seeks to Have This Case Decided in the *Gerosa* Case, No. 461, O. T. 1954

It is obvious that the City of New York, in its petition for writ of certiorari in *Gerosa* v. *The United Piece Dye Works* (O. T. 1954, No. 461), is asking this Court to adopt the principles stated by the Court of Appeals in this case and to apply them in that case, thus foreclosing consideration thereof in this case. (See paragraph 3, pp. 11 and 12 of said petition and the opinion of the Court of Appeals in this case printed in Appendix A at p. 20 of said petition.) The difference on the facts between the two cases is obvious, but the appellee seeks to have this Court cast them in the same mold by shaping them into an "apportionment" formula, despite the undisputed fact that the tax in each case is imposed (1) directly upon gross receipts from interstate commerce, and (2) expressly for the privilege of engaging in such commerce.

Appeal Practice in the New York Courts Is Irrelevant

Despite the quotation, on page 5 of ~~appellant's~~ appellee's motion, from Cohen and Karger, Powers of the New York Court of Appeals, the fact remains that those authors state on page 336 that where, in an Article 78 proceeding such as this, "the Appellate Division annuls the determination and directs further proceedings before the agency, further judicial review of any ensuing determination by the agency can be had only in a second and independent Article 78 proceeding".

These same authors point out on page 50 that it has recently been held that an order of the Appellate Divi-

sion in such an Article 78 proceeding annulling the determination of a Town Board and remitting the matter to the Board for audit and allowance of the claims, is final, notwithstanding that the amount of the allowance is yet to be determined, citing *Matter of O'Hara* v. *Harwood*, 276 N. Y. 561.

In any event, the practice in the New York courts is irrelevant to the issues before this Court. The New York Court of Appeals has jurisdiction of an appeal from a non-final judgment of the Appellate Division. *Cohen* and *Karger, op. cit., supra*, page 5 and page 349, where the authors state: "Serious questions of law, eminently proper for consideration by the Court of Appeals, are not necessarily restricted to final determinations."

Appeals from non-final judgments in New York are granted by permission of the Appellate Division, not the Court of Appeals (*Cohen* and *Karger, op. cit., supra*, page 358):

Irreparable Injury to the Appellant Is Present Here.

The appellee has demanded, under threat of unconscionable penalties (Adm. Code § B46-14.0, Jurisdictional Statement, Appendix D, p. 67), and now holds the appellant's tax payments and refuses to refund them. The administrative proceedings before the appellee are so long-drawn-out as almost to be interminable. It took over five years from May 20, 1948 (R. 56) until May 26, 1953 (R. 57) to complete these administrative hearings before the appellee in this case.

The proceedings before the same appellee in the companion case of *Gerosa* (substituted for *Lazarus Joseph*)

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v. *The United Piece Dye Works* (No. 461, O. T. 1954), were pending without a determination for over two years and nine months.

It is impossible to get these hearings scheduled except at the rate usually of a half day per month (Record in both cases) due to the congested hearing calendar and appellee's manner of scheduling hearings. In the meantime appellant and other taxpayers similarly situated are deprived of the use of this tax money unlawfully withheld by the appellee. The loss of the use of this money is as irreparable as the loss of use of physical property immediately transferred by decree with deferred determination of damages or value or an accounting. There is no telling when this appellant will get any refund and there is no provision for compensating appellant for the loss of use of its money other than interest at the rate of 4% per annum, which does not by any means make the appellant whole.

CONCLUSION

Probable jurisdiction herein should be noted.

Respectfully submitted,

MATTHEW S. GIBSON,
Counsel for Appellant,
Office & P. O. Address,
17 Battery Place,
New York 4, New York.